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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 558

ALASKA PACKERS ASSOCIATION, PETITIONER

v.

WARREN H. PILLSBURY, AS DEPUTY COMMISSIONER OF THE THIRTEENTH COMPENSATION DISTRICT UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, AND FRANK WEIDEMANN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT WARREN H. PILLSBURY, DEPUTY COMMISSIONER

OPINIONS BELOW

The District Court rendered no opinion. Its findings of fact and conclusions of law (R. 204–208) are unreported. The opinion of the Circuit Court of Appeals denying a motion to dismiss the appeal to that court (R. 260–269) is reported in 78 F. (2d) 587. The opinion and dissenting opinion of that court on the merits (R. 271–285) are reported in 85 F. (2d) 758.

JURISDICTION

The judgment of the United States Circuit Court of Appeals was entered September 22, 1936 (R. 286). The petition for certiorari was filed December 7, 1936, and was granted January 18, 1937 (R. 289). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In view of the limitation contained in the order allowing certiorari (R. 289), the question presented is the operation of the Act of February 13, 1925, and its effect upon Rule 1 of the Admiralty Rules of the Circuit Court of Appeals for the Ninth Circuit with respect to the mode of taking an appeal.

STATUTE AND RULE OF COURT INVOLVED

Section 8 (c) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 940 (U. S. C., Title 28, Section 230), provides:

> No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree.

Rule 1 of the Admiralty Rules of the Circuit Court of Appeals for the Ninth Circuit provides: [1]

---

[1] Printed in its original form at 208 Fed. xx; in amended form, in Digest of United States Supreme Court Reports, vol. 1–A, Supplement No. 3, p. 116.

> An appeal from an interlocutory or final decree to the Circuit Court of Appeals shall be taken by filing in the office of the clerk of the District Court, and serving on the proctor of the adverse party a notice signed by the appellant or his proctor that the party appeals to the Circuit Court of Appeals from the decree complained of.
>
> The appeal shall be heard on the pleadings and evidence in the District Court, unless the Appellate Court, on motion, otherwise order.

A footnote to Rule 1 reads: [2]

> This rule so far modifies Rule 11 of the General Rules that a petition for an appeal and the allowance thereof is not required in an admiralty case, nor is the assignment of errors required to be filed with notice of appeal. The assignment of errors must, however, be sent up to the appellate court with the apostles, as required in Rule 4 of the Admiralty Rules. (*Kenney* v. *Louie*, No. 939. Motion to dismiss appeal denied May 6, 1903.)

STATEMENT

Respondent Weidemann sustained personal injuries at Alameda, California, aboard a ship of the Alaska Packers Association, petitioner herein, and was awarded compensation against petitioner

[2] The court below stated (R. 264) that this footnote is "an integral part of the rule" and recited (R. 263–264) the circumstances bringing about its inclusion in the rules.

under the Longshoremen's and Harbor Workers' Compensation Act (c. 509, 44 Stat. 1424; U. S. C., Title 33, Ch. 18) by the United States Employee's Compensation Commission. Respondent Pillsbury, Deputy Commissioner, rendered the compensation order (R. 155).

Petitioner thereupon filed its bill (R. 2) in the United States District Court to set aside the Deputy Commissioner's compensation order. The proceedings were transferred to the Admiralty side of the court (R. 14, 15, 23) and additional testimony taken. The District Court filed findings of fact and conclusions of law (R. 204), and on December 27, 1934, entered a final decree setting aside the compensation order (R. 231).

On March 25, 1935, the Deputy Commissioner filed with the clerk of the District Court notice of his appeal (R. 233–235) and his assignments of error (R. 236). Notice thereof was served on counsel for petitioner. On March 25, 1935, the trial judge, after the filing and service of the Deputy Commissioner's notice of appeal, signed an order which recited the filing and service of that notice of appeal and which directed all the original exhibits in the case to be transmitted to the Circuit Court of Appeals with the apostles on appeal (R. 243). On the same day the trial judge signed a second order approving the stipulation of counsel respecting the content of the apostles and the right to file supplemental apostles (R. 250–251). These orders were filed March 25, 1935, and were incor-

porated in the transcript of record before the Circuit Court of Appeals (R. 243, 251).

On March 27, 1935, Weidemann filed with the clerk of the District Court and served notice of his appeal (R. 235), and on April 22, 1935, filed his assignments of error (R. 237). On April 6, 1935, the trial court approved Weidemann's cost bond (R. 248). The two appeals were consolidated by order of the District Court filed May 9, 1935 (R. 244).

Petitioner, in the Circuit Court of Appeals for the Ninth Circuit, moved to dismiss the appeals on these grounds: first, that no application was made to and allowed by any judge or court; second, that as to Weidemann's appeal, no assignments of error were filed as provided by General Rule 11 of that court, and that the appeal was not timely; and third, that as to the Deputy Commissioner's appeal, if Weidemann's appeal were dismissed, it would follow that this appeal must be, because the decree is joint and not severable or subject to summons and severance, and further, that the Deputy Commissioner has no interest in the subject matter and cannot maintain an appeal on his own behalf (R. 257).

This motion was overruled. The Circuit Court of Appeals rendered an opinion upon the motion in which it stated that the appeals here were taken in strict compliance with Admiralty Rule 1 of the Ninth Circuit, *supra*, p. 3, and that that rule, as

here applied, is in harmony with Section 8 (c) of the Act of February 13, 1925, *supra*, p. 2.

The case is brought before this Court upon a writ of certiorari limited to the question of the operation of the Act of February 13, 1925, and its effect upon Admiralty Rule 1 of the Circuit Court of Appeals of the Ninth Circuit. The decision and opinions (R. 271–285) of the Circuit Court of Appeals upon the merits, reversing the District Court, are not here involved.

SUMMARY OF ARGUMENT

Admiralty Rule 1 of the Ninth Circuit Court of Appeals was adopted on May 21, 1900, and provides that appeals in admiralty to that court may be taken by filing a notice of appeal in the office of the clerk and serving it upon the adverse party. The rule was readopted in 1928. It is now contended that it is in conflict with the express language of Section 8 (c) of the Act of February 13, 1925.

That section, as is evident from the legislative history, was designed solely to change the *time* within which an appeal might be allowed and was not intended to affect the *mode* of taking an appeal. No reference is made in either the reports of the legislative committees or in the debates in Congress of any intention to change the manner of taking appeals, even though at that time the Second and the Ninth Circuits each had rules which would, if petitioner were correct, have been changed by the statute. Moreover, other sections of the Act of

February 13, 1925 indicate that petitioner's contention is unsound.

Petitioner is likewise incorrect in urging that Admiralty Rule 1 conflicts with prior statutes. The Admiralty Rules of the Second Circuit for over twenty-five years allowed appeals merely by notice and the Admiralty Rule here involved has been in effect since 1900. It is inconceivable that rules so long established should be wholly without foundation. *Stuart* v. *Laird*, 1 Cranch 299, 308.

Cases cited by petitioner in support of its position do not hold invalid rules such as the one here involved, but merely contain general statements that under Section 8 (c) every appeal must be allowed. To the extent that those cases are in conflict with the above analysis, we submit that they are erroneous.

ARGUMENT

The development of the statutes and rules of court regulating the appellate jurisdiction and practice of the court below is set forth in its opinion denying petitioner's motion to dismiss the appeals, (R. 261–265.) The Act of March 3, 1891 (c. 517, 26 Stat. 826; U. S. C., Title 28, Ch. 6), which established the United States Circuit Courts of Appeals, did not prescribe the form or manner in which appeals to those courts should be taken,[2] but, by Section 2, expressly gave to the Circuit Courts of Appeals the power, which remains with

[2] See p. 14, *infra*.

them, to prescribe the form of writs, process and procedure conformable to the exercise of their jurisdiction and to make court rules for the conduct of their business. Accordingly, the Circuit Court of Appeals for the Ninth Circuit on June 22, 1891, established its General Rules for the conduct of business, of which Rule 11 prescribes the manner of taking appeals. Rule 11, as amended in 1924 to include a provision relative to citation, and in 1928 to delete references to writs of error, reads as follows (R. 262):

> The appellant shall file with the clerk of the court below, with his petition for appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No appeal shall be allowed until such assignment of errors shall have been filed. Citation shall issue immediately upon the allowance of the appeal. * * *

Until the adoption by that court of its Admiralty Rules, admiralty appeals were governed by this general provision, and an allowance of the appeal was necessary. On May 21, 1900, the Circuit Court of Appeals for the Ninth Circuit adopted its Admiralty Rules, of which Rule 1 originally read (R. 262):

> An appeal to the Circuit Court of Appeals shall be taken by filing in the office of the Clerk of the District Court, and serving on the proctor of the adverse party, a notice signed by the appellant or his proctor that

> the party appeals to the Circuit Court of Appeals from the decree complained of * * *.

On June 27, 1928, this rule was amended and readopted in its present form, *supra*, p. 3.

Soon after the adoption of Admiralty Rule 1 in its original form, the court below considered the unreported case of *Kenney* v. *Louie*, (R. 263) the decision of which prompted the court to append to its Admiralty Rule 1 a footnote, which was preserved in the 1928 revision (*supra*, p. 3), which states that General Rule 11, *supra*, is modified so that in an admiralty case a petition for appeal and an allowance thereof is not required, nor is an assignment of errors required to be filed with the notice of appeal. This footnote was stated by the court below to be recognized as an integral part of Admiralty Rule 1. A footnote was appended to General Rule 11 admonishing the reader to "see note to Admiralty Rule 1." (R. 263–264.)

The court below declared it was not unaware of the passage of the Act of February 13, 1925, when it revised its rules and readopted Admiralty Rule 1 in 1928, but that, instead, "The revision was made in the light of and in conformity with the Act" (R. 267), stating (R. 265):

> The purpose and, we think, the only purpose of Sec. 8 (c) of the Act of February 13, 1925, was to shorten from six months to three months the time within which appeals might be taken to the Circuit Courts of Appeals.

We submit that the court below was correct in so holding, and that Section 8 (c) should be held to have no bearing whatsoever upon the *mode* of taking an appeal.

Petitioner contends, however, that by Section 8 (c) Congress made mandatory and jurisdictional the allowance of an appeal in every case, and that Admiralty Rule 1, is, therefore, in conflict with the statute and void. We are unable to agree.

In the first place, it is quite apparent from the legislative history of the measure that it was designed solely to change the *time* within which an appeal should be allowed, and was not intended to affect the *mode* of taking an appeal. The original bills which eventually became the Act of February 13, 1925 (S. 2060 and H. R. 8206) did not contain the provision now included as Section 8 (c). Congressional Record, 68th Cong., 2d Sess., pp. 2750, 2877. Section 8 (c) was an amendment proposed and apparently drafted by some of the members of this Court. It was enacted without change and adopted by the House without debate. *Id.*, pp. 2918, 2879, 3005; House Report No. 1075, 68th Cong., 2d Sess.

At the hearing before the Committee on the Judiciary, Mr. Justice Van Devanter stated:

> In section 8 (c) the bill fixes three months as the period within which application must be made for a writ of error or appeal to take any case before a circuit court of appeals for review. The period now prescribed is

six months, and the purpose of the change is to make this period conform to that fixed for applying for a review in the Supreme Court. There is no reason why a longer period should be allowed when a review is in the circuit court of appeals than when it is sought in the Supreme Court.[4]

The debates in the Senate are similarly devoid of any indication that the purpose of the bill was to be any other than a change in the time within which appeals could be taken. Some pertinent extracts from the remarks of Senator Albert B. Cummins, Chairman of the Senate Committee on the Judiciary, are set out in the margin.[5]

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[4] Hearings of the Committee on the Judiciary, 68th Cong., 2d Sess., serial 45, p. 16.

[5] Congressional Record, 68th Cong., 2d Sess., p. 2918:

Mr. CUMMINS. They are amendments which have grown out of correspondence sent to me, and sent to the Chief Justice, and sent to the chairman of the Judiciary Committee of the House with respect to certain formal matters, matters which are really formal.

* * * * *

Mr. CUMMINS. That would reduce by three months the time provided in the present statute. The time now is six months. It is simply absurd, it seems to me, to say that a successful litigant must wait six months in order to allow his opponent time to make up his mind whether he will prosecute an appeal or sue out a writ of error.

Mr. KING. Mr. President, I want to ask the Senator whether the right of review must be perfected, the record made up, and everything prepared within three months?

Mr. CUMMINS. No.

Mr. KING. The Senator knows that in many instances, in order to make up a record, get a transcript of testimony, settle the bill of exceptions, and what not, more than three

The absence of all indication of an intention to change the mode of taking an appeal becomes even more significant in light of the fact that at that time the two leading admiralty circuits, the Second and Ninth, each had rules specifically providing that appeals in admiralty might be taken without an allowance (Admiralty Rules, Rule 1 (see 150 Fed. lv, cxxxv)) [6] which were, moreover, impliedly recognized by the rules of this Court (Admiralty

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months are consumed. I have known many instances where a much longer time than three months was required, even where the person who sought the appeal or the writ of review acted with the utmost zeal. He could not obtain the record and settle the bill of exceptions within the time.

Mr. CUMMINS. This provides that the application for review shall be made within three months. That is simply the beginning of the process for reviewing the decree. I cannot imagine an instance in which the application cannot be made within three months if reasonable diligence is exercised, and it is very unfair to leave the matter in suspense.

Mr. OVERMAN. I understand that after a man makes his application, he will have all the time he wants to settle the record.

Mr. KING. We have not the amendments in printed form before us, and I am not familiar with the full text; but if after the application is filed the court has jurisdiction to extend the time within which the record may be perfected, that would be satisfactory.

Mr. CUMMINS. That is the law now, according to the Supreme Court of the United States. This is simply correcting the law with regard to the time for applying for a review from the circuit court of appeals.

The PRESIDING OFFICER. The question is on agreeing to the amendment.

The amendment was agreed to.

[6] The rule in the Second Circuit was amended to require the allowance of an appeal on December 10, 1928.

Rules, Rule 49 (K) (see 254 U. S., App. pp. 22, 23)). Each of those rules had been in effect for over 25 years, and must have been known to the members of this Court and to the members of Congress who were engaged in drafting this legislation. If it was intended that those rules be abrogated, it is inconceivable that mention of that intention would not have been made.

Further proof that the phrase in Section 8 (c) referring to the allowance of an appeal should not be construed as making an allowance mandatory is afforded by other sections of the same Act. Twice in Section 1 and again in Section 10 the Act provides that appeals "may be taken". If the same canon of construction be applied to these phrases which petitioner seeks to apply to Section 8 (c), the Act would, in these instances, necessarily nullify any rules of court which required the allowance of an appeal. Obviously, they do not and were not intended to have that effect. No more so should language intended merely to accomplish a limitation on the time of appeals be held to effect a radical change in the mode by which those appeals are to be taken. The expressions "allowed", "taken", "entertained" and similar words are used in this and other statutes as words of description and not in a jurisdictional or procedural sense.

Petitioner urges, however (Br. p. 14) that even though it be conceded that Section 8 (c) had no effect upon the mode of taking an appeal, never-

theless Admiralty Rule 1 here involved is invalid because in conflict with prior statutes. We do not believe that such a conflict exists.

This Court has for many years required the allowance of an appeal to it, both from a state court or from an inferior Federal court, due to the express provision of Revised Statutes, Section 999, which was derived from the Judiciary Act of 1789. See *Havnor* v. *New York,* 170 U. S. 408, 410; *Barrel* v. *Transportation Co.,* 3 Wall. 424. No distinction was made in this regard with respect to appeals in admiralty. *Barrel* v. *Transportation Co., supra.*

The same rule has not, however, prevailed in the lower Federal courts. Upon the creation of the Circuit Courts of Appeals in 1891, those courts were, by Section 2, given power to prescribe the form of writs, process and procedure conformable to the exercise of their jurisdiction and to make court rules for the conduct of their business. (Section 2, Act of March 3, 1891, c. 517, 26 Stat. 826.) Cf. *The S. S. Osborne,* 105 U. S. 447, 450. Pursuant to this statute, and certainly with full knowledge of its provisions, the Second and Ninth Circuits adopted their Admiralty rules allowing appeals to be taken by filing notice thereof with the clerk. In the Second Circuit, a Justice of this Court, in addition to the judges of the Circuit Court of Appeals, apparently approved the procedure thereby specified. See 150 Fed. lv. Under these two rules literally thousands of appeals in admiralty must have

been prosecuted. Clearly such a long-continued and well accepted practice should not now be held improper. *Stuart* v. *Laird*, 1 Cranch 299, 308, 309. The general statements in the cases cited on p. 18 of petitioners brief are not persuasive to the contrary.

Petitioner contends (Br. pp. 11–13) that Section 2 of the Act of January 31, 1928[7] (c. 14, 45 Stat. 54) and the amending Act of April 26, 1928 (c. 440, 45 Stat. 466) lend support to his construction. Section 2 provided that in all cases where an appeal may be taken as of right it shall be taken by filing a written notice thereof with the clerk and serving a copy of the notice on the adverse party, with a proviso that the mode of taking an appeal from state courts of last resort should remain as it had been before—that is, by petition and allowance. This section was amended by the Act of April 26th to provide simply that appeals which were substitutes for the former writs of error should be governed by the provisions formerly applicable to writs of error.

Petitioner contends that the enactment of Section 2 and its subsequent amendment would be meaningless unless at the time Section 2 was enacted the statutes required the allowance of an ap-

[7] This Act was first proposed on February 29, 1924, as S. 2693, 68th Cong., 1st Sess.; see H. Rep. 934 (June 2, 1924).

peal in every case. We are unable to agree with the contention. If, as we have pointed out above, appeals in admiralty prior to 1928 might be taken by filing notice thereof, the Act of January 31st had no bearing upon the procedure in such cases. Consequently, the elimination of that section by the Act of April 26th was likewise without significance with respect to appeals of this character.

It is true that there are several cases in the Circuit Courts of Appeals which state broadly that Section 8 (c) requires that an appeal be allowed in every case. Brief for petitioner, pp. 7–9. None of them, however, holds that a rule of court such as that involved here is contrary to that section; indeed, in many instances the decisions seem to be predicated as much on the non-compliance with a court rule requiring the allowance of an appeal as upon a non-compliance with Section 8 (c). To the extent that the language of those opinions indicates that Section 8 (c) requires that an appeal most be allowed in *every* case, we believe they are in conflict with the true meaning and intent of Section 8 (c) as developed above.

The question as to whether the orders signed by the trial judge, referred to in the Statement, would amount to an action on the part of the court that may be construed as an allowance of the appeal, is not, in view of the limited order allowing certiorari, before this Court. It will only be discussed summarily in support of our request that in the event

that this Court decides the question presented contrary to our contention, this Court remand the case to the court below with the direction to determine whether, in fact, there was an allowance of the appeal. The court below did not consider this point, believing that no allowance of appeal was necessary.

The courts have said that no formal order of allowance of appeal or writ of error is necessary, but that there must be some action by the court that may be construed as an allowance thereof. *Sage* v. *Railroad Company*, 96 U. S. 712, 714; *Brown* v. *McConnell*, 124 U. S. 489, 490; *Vaughan* v. *American Insurance Co.*, 15 F. (2d) 526, 527 (C. C. A. 5th). Such actions as the taking of security and the signing of the citation (*Sage* v. *Railroad Company, supra; Brandies* v. *Cochrane*, 105 U. S. 262) and the signing of the citation alone (*Brown* v. *McConnell, supra*) have been held sufficient to effect the allowance of an appeal.

The orders here, which are set out in the margin,* cannot be said to be so disconnected from the act

* The orders are as follows:

ORDER TRANSMITTING ORIGINAL EXHIBITS

It appearing to the above-entitled court that Respondent Warren H. Pillsbury, having served and filed his notice of appeal in the above-entitled matter; and

Good cause now appearing therefor;

It is ordered that all original exhibits introduced in evidence in the above-entitled cause be and the same are hereby ordered transmitted to the United States Circuit Court of

of allowance of appeal as to render the opportunity of judicial decision unwarranted. Surely the action of the court in signing them is more indicative of an allowance of and an intent to allow an appeal than the situation presented in *Ross* v. *White*, 32 F. (2d) 750 (C. C. A. 6th), relied on by petitioner upon this point, and in which it was held that there had been no act sufficient to amount to an allowance of appeal.

We respectfully request, therefore, that in the event this Court should determine that the allowance of an appeal by the court is a necessary step in prosecuting an admiralty appeal in the Ninth Circuit, the case be remanded to the court below with directions to proceed to determine whether the appeal has, in fact, been allowed.

Appeals for the Ninth Circuit, as original exhibits, with the apostles on appeal in said cause.

Dated this 25th day of March, 1935.

HAROLD LOUDERBACK,
United States District Judge. (R. 243.)

STIPULATION RE PRAECIPE FOR APOSTLES ON APPEAL

It is hereby stipulated and agreed by and between the parties hereto that all pleadings, testimony, exhibits and other documents in the above case, other than those specifically specified in the foregoing praecipe, may be omitted from the apostles herein with the right reserved to any of the parties to file supplemental apostles herein if deemed necessary.

[Names of counsel.]

It is so ordered:

HAROLD LOUDERBACK,
United States District Judge. (R. 250.)

CONCLUSION

It is respectfully submitted that the decision of the Circuit Court of Appeals should be affirmed, and that, should this Court find the court below to be in error, the case should be remanded to the court below with directions to proceed to determine whether there was in fact an act sufficient to constitute the allowance of the appeal.

STANLEY REED,
Solicitor General.
WILLIAM W. SCOTT,
Acting Assistant Attorney General.
J. FRANK STALEY,
STEPHEN M. FARRAND,
CHARLES A. HORSKY,
Attorneys.

MARCH 1937.

U. S. GOVERNMENT PRINTING OFFICE: 1937